

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

60470

FILE: B-183610

DATE:

FEB 3 1976

MATTER OF: Mr. Rodney E. Nelson

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DIGEST: Service member earns 85 days of leave and uses 193 days of leave thereby incurring 108 days of excess leave during his active service is indebted to the United States for pay and allowances received for such excess leave. The claim of the United States may not be waived under 10 U.S.C. 2774 (Supp. II, 1972) even though indebtedness resulted from administrative error in allowing leave to be taken, since member is at least partially at fault in matter, particularly when he was receiving leave and earnings statements which correctly showed a minus leave balance.

This action is the result of an appeal by Mr. Rodney E. Nelson, from a settlement by the Transportation and Claims Division (now Claims Division) of this Office dated December 20, 1974, which partially denied a request for waiver under the provisions of 10 U.S.C. 2774 (Supp. II, 1972) of the claim of the United States against him in the amount of \$1,389.43 arising out of his service in the United States Army.

The record indicates that Mr. Nelson served on active duty in the United States Army from December 19, 1969, through February 20, 1973. The maximum leave that he could have earned during that period was 95-1/2 days. The member used and received pay for 193 days of leave during the same period, which was 97-1/2 days more than the maximum leave he could have earned. The record further indicates that the member was in an absent-without-leave (AWOL) and an excess leave status during part of the time. Since leave is not earned during periods of excess leave and being in an AWOL status, his earned leave was reduced from 95-1/2 days to 85 days thereby increasing his total unearned leave to 108 days. A charge against Mr. Nelson was entered in the amount of \$1,963.35. In addition, a review of his pay records indicated a class E allotment in the amount of \$10.08, had not been deducted from his pay, which increased his debt to \$1,973.43. Credits due Mr. Nelson totalling \$573.92 were applied to the debt leaving a balance of \$1,399.51.

The Transportation and Claims Division of this Office waived that portion of his indebtedness which related to the nondeduction for the class E allotment in the amount of \$10.08, reducing the indebtedness to \$1,389.43, but denied waiver of that part of the debt relating to excess leave.

This partial denial of his request for waiver was based on the fact that during his tour of duty in the Army he was receiving leave and earnings statements showing the actual balance of his leave, and although these statements showed a minus leave balance he continued to use leave. In these circumstances, it was determined that Mr. Nelson was at least partially at fault, although there was administrative error involved.

Under the provisions of 10 U.S.C. 2774, the Comptroller General may waive in whole or in part a claim by the United States arising out of an erroneous payment of pay and allowances made to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States. This authority to waive claims by the United States may not be exercised, however, if in his opinion, there exists in connection with the claim an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any person having an interest in obtaining a waiver of the claim.

Although it is not entirely clear on what basis Mr. Nelson has appealed the settlement of his case, we have reviewed the entire record in his case. There can be little doubt that administrative error was involved to permit Mr. Nelson to use leave far in excess of that which he had accrued or could have earned during the period of his enlistment, thereby causing an erroneous payment. However, we do not consider it unreasonable to conclude that he was at least partially at fault in using leave to the extent that he did, particularly in view of the fact that he was receiving periodic leave and earnings statements which provided correct information concerning his leave balance.

Accordingly, under the provisions of 10 U.S.C. 2774 waiver of Mr. Nelson's indebtedness must be denied and action by our Transportation and Claims Division is sustained.

R.F.KELLOGG

Deputy Comptroller General
of the United States